December 13, 2021

Submitted electronically

Mr. Ali Khawar
Acting Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights
RIN 1210–AC03

Dear Acting Assistant Secretary Khawar:

We write on behalf of the Committee on Investment of Employee Benefit Assets ("CIEBA") regarding the regulation proposed by the Department of Labor ("DOL") related to fiduciary duties with respect to Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (the "Proposed Rule") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). CIEBA appreciates DOL's efforts to clarify the rules related to fiduciaries' duties with respect to the consideration of environmental, social, and governance ("ESG") factors when making investments and the exercise of shareholder rights. Below we provide comments on the Proposed Rule.

I. Background on CIEBA

CIEBA represents 115 of the country's largest pension funds and defined contribution plans. Our Members manage more than $2.5 trillion of defined benefit and defined contribution assets on behalf of more than 16 million plan participants and beneficiaries. CIEBA represents the interests of chief investment officer fiduciaries, virtually all of whom have decades of experience in serving as investment fiduciaries for many of the largest and most sophisticated private retirement savings pension and 401(k) plans in the United States. Since 1985, CIEBA has provided a nationally recognized forum and voice for corporate plan fiduciaries on investment and fiduciary issues.

II. Preliminary Comment on the Need for Certainty, Not Rulemaking

As a preliminary matter, we believe the Proposed Rule is an improvement over the financial factor and proxy voting rules finalized in 2020 (the "2020 Rules"). The Proposed Rule materially reduces

burdens on plan fiduciaries and appropriately eliminates some of the regulatory bias against certain investment strategies.

That said, we reiterate our ongoing concern about the frequent changes to DOL's position with respect to the subjects covered by the Proposed Rule. Over the years, DOL has taken various positions with respect to the issues covered by the Proposed Rule that have been, at best, inconsistent and, at worst, contradictory, despite the fact that there has been no change to the relevant portion of ERISA. This back-and-forth causes confusion and forces fiduciaries to expend resources trying to understand the law. Ultimately, however, DOL's pronouncements have little-to-no practical impact on decisions material to plan investments because fiduciaries already understand their duties and act accordingly.

Additionally, we continue to question the need for the Proposed Rule, the 2020 Rules, or any additional guidance at all. It is crystal clear that, under ERISA, a fiduciary must act prudently and solely in the interest of plan participants when making and managing investments. After more than four decades since the passage of ERISA, plan fiduciaries understand that DOL interprets ERISA to (i) require fiduciaries to first and foremost consider financial factors when making investment-related decisions and (ii) only consider collateral issues as a tie breaker. This principals-based framework is beneficial as it allows flexibility for fiduciaries to change their approaches and strategies based on new information and developments in the marketplace. The 2020 Rules and the Proposed Rule both attempt to put a finger on the scale to influence the types of investments plan fiduciaries make. We believe that is a fundamentally flawed approach that is counterproductive, and at odds with ERISA. Therefore, we urge DOL to simply repeal the 2020 Rule rather than trying to replace it with the Proposed Rule.

III. Specific Comments

A. Consideration of ESG Factors

We understand that DOL issued the Proposed Rule, in part, to reduce real or perceived legal barriers to ESG investing created by the 2020 Rules. Rightly or wrongly, the 2020 Rules were widely perceived as an attempt, at least in part, to substitute fiduciaries' decisions with respect to the economic relevance of ESG factors with DOL's views on the subject. Revising the 2020 Rules to correct for biases created by the regulation is a positive step.

However, CIEBA is concerned that DOL may have overcorrected and that the Proposed Rule could be interpreted, in some circumstances, as overriding a fiduciary's considered judgement with respect to which investment factors to consider. For example, the Proposed Rule states that a prudent process "may often require an evaluation of the economic effects of climate change and other ESG factors…." It also lists examples of what DOL believes may be, depending on the facts and circumstances, material to a fiduciary's prudent risk-return analysis (*i.e.*, climate change factors, governance factors, and workplace practices).

We do not believe it was DOL's intent to require plan fiduciaries to consider factors with little or no economic impact on an investment. However, the fact that the Proposed Rule specifically identifies particular considerations could be interpreted by some as directing fiduciaries to consider those factors. This result runs contrary to the fundamental standard of care under ERISA and creates both confusion and litigation risk for plan fiduciaries.

If DOL chooses to finalize a rule, we urge the agency to strive for neutrality with respect to investment-related considerations. We ask that DOL simply reiterate its longstanding views with respect to investments and not attempt to put a finger on the scale in favor of any particular consideration. In short, any final regulation should recognize that plan fiduciaries are in the best position to determine what investment factors are economically relevant and should afford fiduciaries considerable deference.

B. Qualified Default Investment Alternatives ("QDIAs")

We appreciate that the Proposed Rule would apply the same fiduciary standard to the selection and monitoring of a QDIA as applied to other designated investment alternatives, including permitting consideration of ESG factors. This approach provides fiduciaries additional leeway by removing the restrictions included in the 2020 Rules that prohibit plans from utilizing as a QDIA a fund, product or model portfolio if its objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-financial factors.

However, CIEBA is concerned about the requirement in the Proposed Rule that there be a disclosure in situations where the fiduciary considered a collateral benefit in forming the basis for an investment decision. First, it is unclear how such a disclosure should (or could) be made. Second, the dividing line between core and collateral factors is not always clear or easy to identify, so adding a regulatory disclosure requirement creates risk for fiduciaries. Finally, we do not view the disclosure requirement as adding any value to plan participants as those participants already have access to a substantial amount of information about designated investment alternatives.

C. Duty to Vote Proxies

We agree with DOL that proxies should be voted as part of the process of managing a plan's investments, unless a plan fiduciary determines that voting proxies may not be in the plan's best interest, such as when voting involves significant cost or effort. However, we are concerned that the Proposed Rule would eliminate the statement in the 2020 Rules that "the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right." DOL states that the removal is to avoid confusion or misunderstanding by plan fiduciaries that they should be indifferent to exercising shareholder rights. We believe it is the removal of this language, and not its existence, that will cause confusion. Preamble language stating that the Proposed Rule would not require fiduciaries to vote all proxies is simply not enough to prevent the perception by the regulated community that the change is a fundamental change in DOL's position.

D. Proxy Voting Safe Harbors

CIEBA does not support or oppose the elimination of two proxy voting safe harbors. However, CIEBA generally supports rules that permit fiduciaries to create processes and procedures to make proxy voting decisions more efficient, including establishing voting policies. Many fiduciaries have adopted

voting policies, and it is helpful that the 2020 Rules clarify this is permissible. CIEBA urges DOL to ensure that any final rule clearly states that voting policies are permissible and that fiduciaries are not required to conduct an analysis of each proxy to determine whether a fiduciary needs to deviate from the permitted practice.

E. Elimination of Documentation Requirements

CIEBA agrees that the documentation requirement under the 2020 Rules "may create a misperception that proxy voting and other exercises of shareholder rights are disfavored or carry greater fiduciary obligations, and therefore greater potential liability, than other fiduciary activities." Therefore, we support the elimination of the requirement and believe that the general framework for ERISA is sufficient to govern the recordkeeping requirements for proxy voting.

F. Elimination of a Specific Monitoring Obligation

CIEBA supports the portion of the Proposed Rule that eliminates the specific monitoring obligations when the authority to vote proxies has been delegated to an investment manager or a proxy voting firm. We agree that the general prudence and loyalty duties under ERISA already impose a monitoring requirement. Furthermore, we share DOL's concern that by expressing specific regulatory monitoring obligations, the 2020 Rules may have created an impression that there are special obligations above and beyond the statutory obligations of prudence and loyalty that generally apply to monitoring the work of service providers with respect to proxy voting.

We encourage DOL to ensure that any final rule on proxy voting continue to allow fiduciaries to delegate proxy voting responsibilities and not impose new or overly burdensome monitoring obligations. We ask that DOL continue to clarify that fiduciaries are not required to monitor every proxy vote or second-guess other fiduciaries' specific proxy voting decisions, unless the fiduciary knows or should know the designated fiduciary is violating ERISA with their proxy voting procedures.

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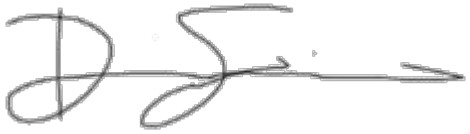
CIEBA appreciates the opportunity to comment on the Proposed Rule. Thank you for your consideration of our views.

Sincerely,



Dennis Simmons
Executive Director